BRIEF IN SUPPORT OF PETITION.

The *Endicott Johnson* Case Discussed.

It seems to us that there is no need to add any words to what the petition says about the conflict between the circuits or the public importance of the question involved. These matters are self-evident. We think it is desirable, however, to discuss briefly the *Endicott Johnson* case.

The case of *Perkins* v. *Endicott Johnson Corp.*, 37 F. Supp. 604, 40 F. Supp. 254 (N. D. N. Y. 1941); 128 F. (2d) 208 (2nd C. C. A., 1942); 317 U. S. 501 (Jan. 11, 1943), arose on an application by the Secretary of Labor to enforce a subpoena under the provisions of the Walsh-Healy Public Contracts Act against the corporation, which had entered into contracts for the supplying of shoes to the United States. The shoes which the contractor had supplied were made in four of its numerous plants, but the materials used in these four plants were produced in a number of others of the contractor's plants. The contractor quite willingly submitted its records from the four plants in which the shoes were made, but it resisted the secretary's subpoena as it related to the other plants. The district court first held that there should be a trial of the issues as to whether the other plans were embraced by the Walsh-Healy Act (37 F. Supp. 604), and then after holding such a trial, it found that they were not. Accordingly, the court said it should not assist the secretary in an extra-legal inquisition (40 F. Supp. 254).

The Circuit Court of Appeals for the Second Circuit reversed the order of the district court and remanded the case with instructions that the court should enforce the subpoena (128 F. (2d) 208). Judge Frank wrote the opinion and dealt with the question on broad grounds. After

pointing out the importance of the functions which had been entrusted to administrative bodies by federal legislation of the past few years, he went on to show his belief that the intervention by courts to supervise the subpoena power of these administrative bodies would impose upon them intolerable delays and frustrations in carrying out their duties. Such court interventions, he thought, were in the nature of interlocutory appeals, which have been consistently frowned on in federal practice. After balancing the interests, Judge Frank concluded that the courts should abdicate from any attempt to protect the citizen against unreasonable searches and seizures while the investigation was in progress. It would be time enough, in his philosophy, to vindicate the citizen's rights after the search and seizure had been made and when the final issues had come on for ultimate determination. A kind of posthumous vindication, it seems to us.

The judge candidly admitted that there were many authorities opposed to him and in particular some opinions written by the late Mr. Justice Holmes. He thought, however, that these should be distinguished or overruled to the necessary extent.

Judge Frank's opinion was thus, as we have said, based on broad grounds, and if it correctly states the law the dredging company in the case at bar has not a leg to stand on.

But while it is true that the Supreme Court affirmed the order of the court of appeals it did not by any means accept Judge Frank's sweeping conclusions. On the contrary, the Supreme Court arrived at its decision solely upon the consideration that Endicott Johnson Corporation appeared, not in the character of citizen, but in the character of public contractor. The Walsh-Healy Act, said the Court (page 507, 317 U. S.):

"is not an Act of general applicability to industry. It applies only to contractors who voluntarily enter into competition to obtain government business on terms of which they are fairly forewarned by inclusion in the contract. Its purpose is to use the leverage of the Government's immense purchasing power to raise labor standards.

"Congress submitted the administration of the Act to the judgment of the Secretary of Labor, not to the judgment of the courts.[10] One of her principal functions is the conclusive determination of questions of fact for the guidance of procurement officers in withholding awards of government contracts to those she finds to be violators for three years from the date of the breach." [10. Cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, and cases there cited.]

Accordingly, the Court held that as the whole matter involved merely the procurement activities of the government, the subject was one entirely to be dealt with by the executive branch and the courts should not intervene. No constitutional question was involved; no judicial question was involved.

As was said of the Walsh-Healy Act by Mr. Justice Black in the *Lukens Steel* case just cited (page 128, 310 U. S.):

"We find nothing in the Act indicating any intention to abandon a principle acted upon since the Nation's founding under which the legislative and executive departments have exercised complete and final authority to enter into contracts for Government purchases. * * *

"The Act does not represent an exercise by Congress of regulatory power over private business or employment."

In the case at bar, the Fair Labor Standards Act of 1938 has nothing to do with government procurement. On the contrary, it most clearly is "an exercise by Congress of regulatory power over private business or employment" and the dredging company appears here as citizen, not as contractor. On the grounds upon which it was put in the Supreme Court, the decision in the *Endicott Johnson* case has no application.

We respectfully submit, therefore, that for the reasons stated in the petition and in this brief, this Court should grant a writ of certiorari and review the highly important questions that are here involved.

Respectfully submitted,

ROGER SIDDALL,
A. V. CHERBONNIER,
ROBERT A. LILLY,
Counsel for Petitioner.

New York, N. Y.,
April 26, 1943.